85-670

No. _____

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
October Term, 1985

ETHYL CORPORATION,

Petitioner,

v.

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC and LOCAL NO. 7441, UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

DAVID L. SWIDER
SOMMER & BARNARD
54 Monument Circle, Suite 900
Indianapolis, Indiana 46204
(317) 639-5400
Attorney for Petitioner
Ethyl Corporation

Of Counsel:

LYLE J. GUILBEAU
ETHYL CORPORATION
451 Florida Boulevard
Baton Rouge, Louisiana 70801
(504) 388-7862

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QUESTION PRESENTED FOR REVIEW

Whether a labor arbitrator has the power to invalidate a plain and unambiguous condition precedent in a collective bargaining agreement in the absence of prior practices demonstrating relaxation of the express language of the contract.

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IN THE

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ETHYL CORPORATION,

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UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC and LOCAL NO. 7441, UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner, Ethyl Corporation* ("Ethyl"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on July 22, 1985.

*Ethyl Corporation has the following affiliates which are wholly owned subsidiaries except where noted: American Mayflower Life Insurance Company of New York; Barclay Reinsurance Company (50% by First Colony Life Insurance Company); Buck Coal, Inc.; Capitol Products Corporation; Eid Corporation; Ethyl Asia Pacific Company; Ethyl Canada Inc.; Ethyl Cooper Limited; Ethyl Export Corporation; Ethyl Foreign Sales Corporation; Ethyl Hellas Chemical Company S.A.; Ethyl Insurance Company; Ethyl Interamerica Corporation; Ethyl

(footnote continued on following page)

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (the "Seventh Circuit") is reported at 768 F.2d 180, and appears in Appendix A to this petition. The judgment, order, and opinion of the United States District Court for the Southern District of Indiana (the "District Court") are unreported, but appear in Appendix B to this petition.

JURISDICTION

The judgment of the Seventh Circuit was entered on July 22, 1985, and appears in Appendix C to this petition. This petition for certiorari was filed within ninety days of that judgment. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a):

(footnote continued from previous page)

Mineralole Oil Additive GmbH; Ethyl Molded Products Company; Ethyl Oil and Gas Corporation; Ethyl Overseas Development Corporation; Ethyl Petroleum Additives, Inc.; Ethyl Petroleum Additives Ltd.; Ethyl Petroleum Corporation; Ethyl Properties, Inc.; Ethyl S.A.; Ethyl VisQueen, Inc.; Fiberlux, Inc.; First Colony Bank and Trust Company; First Colony Credit Company; First Colony Development Company; First Colony Discount Company; First Colony Finance Company; First Colony Leasing Company; First Colony Life Insurance Company; First Colony Mortgage Company; First Colony Properties, Inc.; First Colony Savings & Loan Association; First Colony Underwriting Agencies, Inc.; Floyd County Coal Company, Incorporated; Hardwicke Chemical Company; Hardwicke Export Company; Interamerica Terminals Corporation; Jamestown Life Insurance Company; Joy Corporation; Justine Shipping Corporation; Libby G Corporation; Los Angeles Corporation; Los Angeles Investment Company; Massie Tool & Mold, Inc.; Modern Technical Molding, Inc.; Ram Processing, Inc.; Stork Perforated Products BV (25% by Ethyl Corp.); The Barclay Group, Inc. (50% by Ethyl Corp.); The Edwin Cooper Corporation; The Elk Horn Coal Corporation (97% by Ethyl Corp.); The Elk Horn Corporation; The William L. Bonnell Company, Inc.; Transcontinental Coal Processing, Inc.

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

This is an action to set aside an award of arbitration rendered under a collective bargaining agreement. The jurisdiction of the District Court was invoked under 28 U.S.C. § 1337 and 29 U.S.C. § 185. The arbitration award, which was issued on December 22, 1982 and appears in Appendix D to this petition, sustained a grievance filed on behalf of several Ethyl employees by the Respondents in this case, the United Steelworkers of America, AFL-CIO-CLC, and Local No. 7441, United Steelworkers of America, AFL-CIO-CLC (hereinafter jointly referred to as the "Union").

In 1980, Ethyl and the Union entered into a collective bargaining agreement covering a unit of employees at a plant in Terre Haute, Indiana. The contract provided that an employee would be eligible for vacation pay the following year if he had worked 1,040 hours during the current year and was "on the payroll of the Company on December 31" of the current year. The contract also provided that in the event an employee was "terminated for any reason" before December 31 and was later "reemployed," he would become entitled to a full paid vacation in any year in which he was reemployed and worked 200 hours. (App. at A-2, A-18, A-28.)*

*As used throughout this petition, "App." refers to the Appendix to this petition. Portions of the record other than those appearing in the Appendix are identified by references to the Joint Stipulated Appendix ("JSA") and Appellee's Supplemental Appendix ("ASA") filed in the Court of Appeals, both of which will be certified to this Court as part of the record below.

On October 15, 1981, Ethyl announced its plans to close the plant in mid-November of 1981 because of economic conditions. At the time of the announcement, there were thirty-three bargaining unit employees on the payroll. These employees were released in phases until December 4, 1981, when the plant was actually closed. All of the employees affected by the shutdown received severance pay, and their recall rights were governed by a contract provision that required a "laid-off" employee's name to remain on the recall list for a period of two years following the date of the layoff. (App. at A-2, A-10, A-32; JSA at 22, 23, 40.)

At the time of the shutdown, all thirty-three employees had already worked more than 1,040 hours in 1981. But except for three employees who were disabled at the time of the announcement and on December 31, 1981,* none received vacation pay for 1982 because none met the December 31 condition precedent. The Union filed a grievance on behalf of those who were denied 1982 vacation benefits, asserting that the company's closing of the plant so late in the year rendered the December 31 payroll requirement inapplicable. Ethyl relied on the express language of the contract in denying the grievance. (App. at A-2; JSA at 24, 32, 33, 42-43.)

Unable to resolve the grievance through any earlier step of the grievance procedure, Ethyl and the Union submitted their dispute to arbitration. While they had agreed in the contract that the decision of the arbitrator would be "final and binding," they had also expressly limited his authority under the agreement:

> The sole function of the arbitrator shall be to determine whether the Company or the Union is correct with reference to the proper application and

*These disabled employees were considered "on the payroll" by the company because they continued to receive holiday pay under the contract during their periods of disability. (ASA at 1-4.)

> interpretation of, or compliance with, the written provisions of this Agreement, and the arbitrator shall not have any authority to change, amend, modify, supplement or otherwise alter in any respect whatsoever this Agreement, or any part thereof. ... It is understood and agreed that the arbitrator shall not alter or change any part of this Agreement.

(App. at A-2; JSA at 39.)

On December 22, 1982, the arbitrator issued his award, sustaining the Union's grievance. In his written opinion, he determined that the December 31 vacation eligibility requirement applied to layoffs, but not to plant closings. (App. at A-35). He opined that by closing the plant Ethyl had made it impossible for the employees to earn a vacation for 1982. In contrast, he noted that if the employees had merely been laid off, they would have retained the possibility of returning to work during 1982 and requalifying for a vacation that year by working 200 hours. (App. at A-34 — A-36.) He concluded that the December 31 requirement could not be used to deny the grievants vacation pay for 1982 because Ethyl had prevented them from meeting it. (App. at A-36 — A-37.)

At the time of the arbitration hearing, in August 1982, there was some possibility that Ethyl might reopen the plant. The arbitrator did not consider the issue relevant to his decision. But in May of 1983, Ethyl did resume operations at the Terre Haute facility. Although a new collective bargaining agreement had been negotiated between the parties in August of 1982, the recall provision of the new contract was exactly the same as that of the 1980 agreement. Pursuant to this provision, Ethyl recalled most of the employees who had been affected by the plant closing. (App. at 3; JSA at 26-27, 40.)

Ethyl filed suit in the District Court to vacate the arbitration award in April of 1983. The District Court determined that Ethyl and the Union had "contracted for a collective

bargaining agreement with two eligibility requirements and the union is therefore bound thereby." (App. at A-22.) The court found no support for the arbitrator's refusal to apply the December 31 vacation eligibility requirement in either the contract or its past application. (App. at A-15 — A-16, A-22.)

In addition to evidence of prior unsuccessful attempts by the Union to eliminate the December 31 condition precedent from the contract at the bargaining table (JSA at 70-86, 111-25), Ethyl had introduced evidence at the arbitration hearing concerning past practice under the contract language at issue. Ethyl showed that the December 31 requirement had been applied consistently to deny vacation benefits to employees with 1,040 hours of service who had been laid off prior to December 31 of one year and not recalled the next. (JSA at 52-53, 86-93, 126-31.) Finding no ambiguity in the vacation eligibility requirements, either on their face or through their application, and relying on the standards enunciated by this Court in *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960), the District Court thus concluded "that the arbitrator's award did not draw its essence from the agreement." Accordingly, the court vacated the award.(App. at A-16, A-21.)

The Union appealed the District Court's determination to the Seventh Circuit. The appellate court reversed the trial court's judgment, after first expressing its preference for a different standard of judicial review than that established by this Court and relied on by the District Court:

> It might in retrospect have been better if the Court had not said 'draws its essence from the collective bargaining agreement,' arresting as this formulation is (it has displaced all its rivals in the marketplace of judicial formulas), but instead had made the test simply whether the arbitrator had exceeded the powers delegated to him by the parties. ... The

> problem with the expression, 'draws its essence from the collective bargaining agreement,' is that it invites the kind of error that the district judge fell into in this case....

(App. at A-5 — A-6.)

Acknowledging that the express terms of the agreement precluded the arbitrator from reaching the decision he did, the Seventh Circuit found that the arbitrator was not bound by those terms. (App. at A-9.) Rather, he could impose implied conditions on the parties, even in the face of plain and unambiguous contract language dispositive of the issue before him: "[T]here is no rule that an arbitrator, in order to find an implied condition, must first find the language of the contract to be ambiguous." (*Id.*)

Accordingly, the court concluded that the arbitrator could properly infer the condition that Ethyl had not intended the December 31 condition precedent to apply in the event Ethyl prevented employees from satisfying it by shutting down the plant (even though the requirement had been applied when Ethyl prevented employees from meeting it by laying them off). (App. at A-9 — A-10.) Inferring an implied condition, even in the face of clear contract language on point, was still contract interpretation under the Seventh Circuit's view and thus required judicial enforcement of the award. (App. at A-9 — A-11.)

REASONS FOR GRANTING THE WRIT

1. The decision of the Seventh Circuit that a labor arbitrator has the authority to deviate from the plain and unambiguous terms of a collective bargaining agreement is in conflict with the decisions of several other federal courts of appeals on the same issue.

As the District Court determined, Ethyl and the Union contracted for a collective bargaining agreement with two

eligibility requirements for the receipt of vacation pay: an employee had to work 1,040 hours **and** be "on the payroll of the Company on December 31 of the year prior to the calendar year in which he is eligible for a vacation plan." (App. at A-18, A-22.) There was simply nothing unclear about this language or its application to the facts of this case. Because of the plant closing on December 4, 1981, none of the grievants met this December 31 condition precedent. Hence, none of them was afforded vacation pay for 1982. The arbitrator could find no ambiguity in this language; the District Court found it perfectly clear; and the Seventh Circuit acknowledged that it was unequivocal. There was also no other provision of the contract that rendered the December 31 requirement unclear. Indeed, the Seventh Circuit expressly recognized this fact: "The company, however, challenges the union to point to a provision that grants vacation pay to workers who neither were on the payroll on December 31 nor worked a single hour the following year; and of course there is none." (App. at A-8.) Furthermore, no inconsistent past practice served to make the December 31 vacation eligibility requirement ambiguous.

Yet, the Seventh Circuit found the absence of an ambiguity in the relevant contract language no obstacle to enforcing the award: "But despite contrary intimations in *Sears, Roebuck & Co. v. Teamsters Local Union No. 243*, 683 F.2d 154, 156 (6th Cir. 1982) (per curiam), there is no rule that an arbitrator, in order to find an implied condition, must first find the language in the contract to be ambiguous." (App. at A-9.) "Intimations" is not a strong enough term. The Sixth Circuit, as well as the Third, Fourth, and Tenth, does not permit an arbitrator to deviate, by inference or otherwise, from the express terms of a collective bargaining agreement absent a past practice evidencing a relaxation of such language. Indeed, the Seventh Circuit's decision to the contrary in this case is

squarely in conflict with *Sears* and several other federal appellate decisions.

In *Sears*, the company and the union had agreed to a subcontracting clause that permitted the company to subcontract work if it could objectively show that such work could be performed "more efficiently and economically" outside the bargaining unit. Sears met this objective test and subcontracted sales work, thereby eliminating ninety bargaining unit jobs. Upon the union's challenge of this action through arbitration, an arbitrator *"inferred limitations on subcontracting beyond those contained in the collective bargaining agreement itself," id.* at 155, and invalidated the company's action. Both the district court and the Sixth Circuit agreed that the arbitrator had exceeded his authority by recognizing implied conditions in the face of clear contract language dispositive of the issue at hand.

In vacating the award, the Sixth Circuit reiterated a standard of review that is in direct conflict with the view of the lower court in the instant case: "This court has consistently adhered to the principle that an arbitrator may construe ambiguous contract language, but lacks authority to disregard or modify plain or unambiguous contract provisions." *Id.; accord, e.g., Detroit Coil Co. v. IAM, Lodge #82*, 594 F.2d 575, 581 (6th Cir.), *cert. denied*, 444 U.S. 840 (1979) ("In view of the clear and unambiguous language of Article V of the collective bargaining agreement, and since the record contains no evidence indicating a departure by the parties from the clear intendment of that language, we conclude that the arbitrator's award cannot be deduced rationally from the Agreement, nor does the award draw its essence from the Agreement."); *Morgan Services, Inc. v. Local 323, Chicago & Central States Joint Board*, 724 F.2d 1217, 1224 (6th Cir. 1984) ("[W]hen the collective bargaining agreement answers the question submitted to the arbitrator in clear and unambiguous language, the arbitrator errs if he looks beyond the contract and uses

extraneous considerations to render the contract's clear language ineffective.").

Also unlike the Seventh Circuit, the Third Circuit will not permit an arbitrator to construe a collective bargaining agreement in a manner inconsistent with its plain terms. Indeed, a decision in all material respects indistinguishable from the present one on its facts is *H. K. Porter Co. v. United Saw, File & Steel Products Workers*, 333 F.2d 596 (3d Cir. 1964). There, the contract established two requirements for pension eligibility: one, the employee had to be at least sixty-five years of age; and two, the employee had to have at least twenty-five years of service with the company. When the company closed the plant, thereby preventing sixty-five-year-old employees from attaining twenty-five years of service, an arbitrator invalidated the second requirement and granted the grievants pro rata pension benefits. Noting no past practice to justify such departure from the unambiguous terms of the contract, the Third Circuit concluded that the arbitrator had exceeded his authority in making such a determination:

> We find that . . . the Arbitrator had no ground upon which to base his interpretation of the clear and unambiguous words of the eligibility clause. Standing by itself, it gave him no room to construe it in any manner than according to its plain meaning. Bereft of any practice evidencing a relaxation of the requirement of years of total service and relying only upon age, the Arbitrator was unjustified in deviating from the plain mandate of the eligibility clause, as it concerned those who fulfilled only the portion making the age of sixty-five a requirement. Indeed, such an interpretation neither goes to the essence nor to the application of the collective bargaining agreement. The District Court erred in holding that the Arbitrator did not exceed his authority . . . .

Id. at 602.

The Fourth and Tenth Circuits also do not permit an

arbitrator to stray from the express terms of a labor agreement without a prior inconsistent application of the language at issue. *See, e.g., Monongahela Power Co. v. Local 2332, IBEW*, 566 F.2d 1196, 1199 (4th Cir. 1976) (In vacating an arbitrator's award, the court explained: "[The arbitrator's] function is confined to the interpretation and application of the collective bargaining agreement under which he acts and, while he may give his own construction to ambiguous language, he is without any authority to disregard or modify plain and unambiguous provisions."); *Mistletoe Express Service v. Motor Expressmen's Union*, 566 F.2d 692, 695 (10th Cir. 1977) (The court set aside an award, reasoning: "An arbitration award will not be upheld when it contravenes the express language of the labor contract.").

The foregoing cases represent only a few of several in which the Third, Fourth, Sixth, and Tenth Circuits have not hesitated to vacate awards rendered by arbitrators who have departed, by inference or otherwise, from the clear terms of a collective bargaining agreement. The standard of review utilized by these courts and consequent holdings make one point convincingly clear: Had the instant case arisen in any of these circuits, the result would have been different. Unlike the Seventh Circuit, none of these courts would have permitted an arbitrator to apply the December 31 condition precedent in a manner inconsistent with its plain meaning.

In sum, the decision below represents a conflict among the federal courts of appeals concerning the power of an arbitrator to deviate from the express terms of a collective bargaining agreement. This important and substantial conflict justifies the grant of certiorari requested in this petition.

2. **The decision below raises significant and recurring problems concerning the proper role of the judiciary in reviewing arbitration decisions.**

In *Textile Workers Union v. Lincoln Mills of Alabama*, 353 U.S. 448 (1957), this Court held that Section 301 of the Labor Management Relations Act of 1947 is to be more than a source of jurisdiction in labor controversies. The Court explained that Section 301 authorizes federal courts to fashion a body of federal law for the enforcement of collective bargaining agreements "and that industrial peace can be best obtained only in that way." 353 U.S. at 455. Implicit in this mandate and objective must be the presumption that the body of federal law thus created will form a unified and consistent whole. For the goal of labor harmony can only be hindered by uncertainty when federal courts adopt conflicting approaches to the same issue.

Twenty-five years ago, in three cases involving the same union present in this controversy, this Court defined the proper roles of the judiciary with respect to enforcing agreements to arbitrate and reviewing arbitration awards. *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). On the latter issue, this Court emphasized that "[t]he refusal of courts to review the merits of an arbitration award is the proper approach." *Enterprise Wheel*, 363 U.S. at 596. But while thereby promoting the express federal policy of settling labor disputes by arbitration, this Court also established the bounds of judicial deference:

> Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so

> long as it draws its essence from the collective bargaining agreement.

Id. at 597.

Almost since its inception, lower federal courts have recognized through their decisions that this "passage is susceptible to conflicting interpretations as to the scope of post-arbitral review." Meltzer, *Ruminations About Ideology, Law, and Labor Arbitration*, 34 U. Chi. L. Rev. 545, 550 (1967); *see also* Kaden, *Judges and Arbitrators: Observations on the Scope of Judicial Review*, 80 Colum. L. Rev. 267, 276 (1980) ("What has become known as the 'essence' test of *Enterprise Wheel* plainly does not elaborate reasons for finality sufficient to describe either the circumstances in which the principle properly applies, or those in which enforcement of an arbitrator's award may be denied."). That the problem has not abated — and, in fact, has intensified — is obvious from the Seventh Circuit's decision in this case as contrasted with those of other federal appellate courts on the same issue. *See also, e.g., Washington Hospital Center v. Service Employees International Union, Local 722*, 746 F.2d 1503, 1516 (D.C. Cir. 1984) ("This does not mean that we think *Detroit Coil* [a Sixth Circuit decision cited herein as being in conflict with the lower court's decision in this case] was correctly decided. To the contrary, we disagree with *Detroit Coil* and reject its use as authority in this circuit."). Indeed, the appellate court in the present case even went so far as to expressly criticize the test. (App. at A-5 — A-6.)

Stated simply, federal courts are struggling to determine how they can assure that an arbitration award "draws its essence" from the collective bargaining agreement without reviewing the merits of the award. Is it enough for the arbitrator to *say* that his award rests on the agreement — any further analysis considered an improper review of the merits? Or must the court look far enough to assure itself that "the arbitrator's award is derived in some

rational way from the collective bargaining agreement"? *Detroit Coil*, 594 F.2d at 579 (emphasis added). These are important, recurring questions raised by the instant case that urgently require this Court's guidance.

Moreover, the error of the Seventh Circuit in deciding this case points out the alarming risk of permitting the judiciary to accord *too much* deference to arbitration awards. If the parties to a collective bargaining agreement cannot be certain that any disputes they have will be resolved in accordance with the plain and unambiguous boundaries to which they have agreed — especially after they have also carefully and expressly attempted to limit the arbitrator's authority to deviate from the terms of their agreement (JSA at 39) —, the use of arbitration to settle labor disputes will inevitably be curtailed. In search of certainty and predictability, the parties will be forced to resort to litigation or economic strength to settle their differences. Indeed, the compelling interests of judicial economy and industrial accord also demand the Court's review of this case.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

DAVID L. SWIDER
Counsel of Record
for Petitioner

Of Counsel:

SOMMER & BARNARD
54 Monument Circle, Suite 900
Indianapolis, Indiana 46204
(317) 639-5400

LYLE J. GUILBEAU
ETHYL CORPORATION
451 Florida Boulevard
Baton Rouge, Louisiana 70801
(501) 388-7862

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of October, 1985, three copies of this Petition for Writ of Certiorari were mailed, postage prepaid, to Paul Whitehead, Esq., Five Gateway Center, Pittsburgh, Pennsylvania, 15222, Counsel for the Respondents. I further certify that all parties required to be served have been served.

DAVID L. SWIDER

APPENDIX

APPENDIX A

Opinion of the Seventh Circuit
(Entered July 22, 1985)

In The

United States Court of Appeals

For the Seventh Circuit

No. 84-3013

ETHYL CORPORATION,

Plaintiff-Appellee,

v.

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC and LOCAL NO. 7441, UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 83 C 471—**James E. Noland**, *Judge.*

ARGUED MAY 28, 1985—DECIDED JULY 22, 1985

Before CUDAHY and POSNER, *Circuit Judges*, and FAIRCHILD, *Senior Circuit Judge.*

POSNER, *Circuit Judge.* The steelworkers union appeals from a judgment setting aside a labor arbitrator's award. The appeal requires us once again to consider the scope of judicial review of labor arbitration awards.

In 1980 the union signed a collective bargaining contract

with Ethyl Corporation to govern employment at a chemical plant in Indiana. The contract contained a provision that an employee with one or more years' service who had worked 1,040 hours during a calendar year and was "on the payroll of the Company on December 31" of that year would have a "vested right" to a paid vacation the following year. A worker who was "terminated for any reason" before December 31 and was later "reemployed" would become entitled to a full paid vacation upon working 200 hours in the year in which he was reemployed.

On October 15, 1981, the company announced that it would close the plant, which had 33 workers, in mid-November. The company discharged eleven of the workers on October 18, ten in November, and eight on December 4, which was when the plant actually closed; the other four workers had not been working on October 15, because of disability. Although all 33 workers had worked more than 1,040 hours in 1981, the company refused to give vacation pay to 30 of them — the 29 active workers plus a disabled worker whose disability ended on December 22. Only the three who were still disabled on December 31 got vacation pay.

The union filed a grievance on behalf of the 30, asserting that everyone who had been on the payroll when the shutdown was announced on October 15, 1981, was entitled to vacation pay for 1982. Pursuant to the collective bargaining agreement, the dispute was referred to an arbitrator, who on December 22, 1982, issued an award that stated, "The grievance is hereby sustained." In an accompanying opinion the arbitrator explained that although the workers would have had no right to vacation pay in 1982 if they had been laid off before December 31, 1981, because none of them worked 200 hours in 1982 (they worked no hours that year — the plant was closed), the parties had not intended the provision for layoffs to apply to a plant closing. Having (by closing the plant) made it impossible for the workers to earn a paid vacation for 1981

by working 200 hours in 1982, the company could not use the requirement that workers be on the payroll on December 31 to deny them vacation pay. Therefore, "employees who were actively working at the time of the plant closing on December 4, 1981, are entitled to vacation pay for 1982."

Although the collective bargaining contract does not make specific provision for paying workers who are denied their vacation rights in violation of the contract, Ethyl does not dispute that if the company violated the collective bargaining contract the workers are entitled to such pay. However, the arbitrator's award does not specify the amount. If the award is limited to the eight workers who were actually working on December 4, when the plant closed, the amount due would be $15,115.80. If the award includes all 30 workers, it would be $53,887.68. Which amount the arbitrator meant to award is in dispute, as we shall see anon.

At the time of the hearing before the arbitrator, in August 1982, there was some possibility that the plant would reopen. The arbitrator considered the possibility too speculative to figure in his decision. But in May 1983, five months after he issued his award, the plant did reopen and the workers were rehired. Presumably, by working 200 hours in 1983 the workers could earn a paid vacation for 1983 on the basis of their work in 1981 — unless the arbitrator's award is sustained and the workers get vacation pay for 1982 based on that work. But the company's position is that the workers had lost all right to a vacation (or pay in lieu thereof) in 1982; since the plant was closed throughout that year, none of the workers worked 200 hours that year to make up for having been off the payroll on December 31, 1981.

The company sued in federal district court, under section 301 of the Taft-Hartley Act, 29 U.S.C. §185, to set aside the arbitrator's award, and the union counter-claimed to

enforce it. On cross-motions for summary judgment the district court set aside the award on the ground that "the arbitrator's award did not draw its essence from the agreement. The award is outside the powers conferred on the arbitrator by the terms of the collective bargaining agreement. It imposes upon Ethyl obligations not contained in the agreement and therefore not bargained for by Ethyl."

Ever since federal courts began enforcing arbitration awards, the scope of judicial review of the award has been extremely narrow. "Arbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal. As a mode of settling disputes it should receive every encouragement from courts of equity. If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error either in law or fact. A contrary course would be a substitution of the judgment of the Chancellor in place of the judges chosen by the parties, and would make an award the commencement, not the end, of ligitation." *Burchell v. Marsh*, 58 U.S. (17 How.) 344, 349 (1855). To this we add that for judges to have taken upon themselves to determine the correctness of the arbitrator's award would inevitably have judicialized the arbitration process, in much the same way that judicial review, even of a deferential sort, tends to judicialize the administrative process. The administrative agency must (at least when its proceedings resemble adjudication) find facts like a court, and reason like a court, if it is to withstand correction by the court. And so it would be with arbitrators if their decisions were subject to the kind of review that courts give agencies. Yet the idea of arbitration, as of administrative decision-making but more strongly since there is no counterpart in arbitration to the Administrative Procedure Act, is to provide an alternative to judicial dispute resolution, not an echo of it. If the parties to an arbitration want appellate review of the merits of the arbitrator's decision, they can establish appellate arbitra-

tion panels, though they rarely do. But they cannot get such review from the federal courts — which would mean, first from the district court, and then, on appeal, from the court of appeals. This would make arbitration a three-tiered, rather than as in normal adjudication a two-tiered, process; it would make arbitration more judicial than adjudication.

Section 301 of the Taft-Hartley Act does not establish standards for the review of arbitration awards. It does not mention arbitration. It is only because section 301 establishes a federal remedy for breaches of collective bargaining contracts, and because many such contracts (including, of course, the one in this case) contain an arbitration clause, that the refusal to comply with an arbitrator's award becomes a breach of contract upon which a section 301 suit can be founded. But in a famous trio of cases involving the same union as in this case, the Supreme Court made clear that the courts in such cases must give the arbitrator his customary deference; the arbitrator's award is enforceable so long as it "draws its essence from the collective bargaining agreement," even if the court thinks the arbitrator misconstrued the contract. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960); see also *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 568-69 (1960).

It might in retrospect have been better if the Court had not said "draws its essence from the collective bargaining agreement," arresting as this formulation is (it has displaced all its rivals in the marketplace of judicial formulas), but instead had made the test simply whether the arbitrator had exceeded the powers delegated to him by the parties. That is the test in the federal arbitration statute, see 9 U.S.C. §10(d), and the Railway Labor Act is quite similar, see 45 U.S.C. §153 First (q). In meaning if not in words, the test is the same under all three statutes. See, e.g., *Loveless v. Eastern Air Lines, Inc.*, 681 F.2d 1272, 1276 (11th Cir. 1982). The problem with the expression, "draws its essence from the collective bargaining agreement," is

that it invites the kind of error that the district judge fell into in this case, of setting aside an arbitration award because the judge is not satisfied that the award has a basis in a particular provision of the contract.

Whenever an arbitrator misreads a contract, it is possible to say that his award fails to draw its essence from the contract; that the ground of the award is not the contract but the arbitrator's misreading. But so long as the award is based on the arbitrator's interpretation — unsound though it may be — of the contract, it draws its essence from the contract. See, e.g., *F.W. Woolworth Co. v. Miscellaneous Warehousemen's Union, Local No. 781*, 629 F.2d 1204, 1214-16 (7th Cir. 1980); *Manhattan Coffee Co. v. International Brotherhood of Teamsters, Local No. 688*, 743 F.2d 621, 623-24 (8th Cir. 1984); *Super Tire Engineering Co. v. Teamsters Local Union No. 676*, 721 F.2d 121, 122-24 (3d Cir. 1983) — the last a particularly good example of deference to a highly improbable reading of the collective bargaining agreement by the arbitrator. It is only when the arbitrator *must* have based his award on some body of thought, or feeling, or policy, or law that is outside the contract (and not incorporated in it by reference, either, see *Jones Dairy Farm v. Local No. P-1236, United Food Workers*, 760 F.2d 173, 176 (7th Cir. 1985)) that the award can be said not to "draw its essence from the collective bargaining agreement," as in our recent decisions in *Young Radiator Co. v. International Union, U.A.W.*, 734 F.2d 321, 325 (7th Cir. 1984), and *Miller Brewing Co. v. Brewery Workers Local Union No. 9*, 739 F.2d 1159, 1164-65 (7th Cir. 1984). This qualification is made clear, by the way, in the preceding sentence of the *Enterprise Wheel & Car* opinion: "an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice." 363 U.S. at 597.

Now often it will be unclear whether the arbitrator has interpreted the contract or relied on some private notion of

equity; and though any reasonable doubt must be resolved in favor of enforcing the award, see *id.* at 597-98, if the arbitrator here had said or implied that although the workers had not complied with a condition precedent to earning their paid vacations fairness required that they get vacations (or pay in lieu thereof), the district judge would have been right to set aside the award. But that would not be a proper characterization of what the arbitrator did. He applied what is after all a traditional principle of contract law: that you cannot prevent the other party to the contract from fulfilling a condition precedent to your own performance, and then use that failure to justify your nonperformance. See, e.g., Farnsworth, Contracts §8.6, at p. 566 (1982). If Ethyl had laid off these workers without shutting down the plant, they would have had a chance to earn a paid vacation in 1982. For they might have been recalled in 1982, and if so they would have had to work only 200 hours in 1982 to be entitled to a paid vacation that year. The company eliminated that chance; it must bear the consequence.

The company attacks this reasoning. Not everyone laid off is recalled within a year. If a worker laid off on December 30 was not recalled during the following year, he would have earned no paid vacation for that year even if he had put in 1,040 hours — or for that matter 2,080 hours — in the preceding year. If he died on December 30, his estate would have no right to vacation pay for the next year, again regardless of how many hours he had worked that year. The contract is unequivocal in conditioning the right to a paid vacation on the workers' either being on the payroll on December 31 (implying that the plant is open then — there would be no payroll otherwise) or working 200 hours the next year. Moreover, the provision for reemployment (the provision that triggers the 200-hour option), in using the term "re-employed" rather than the more common "reinstated" or "recalled" to describe workers laid off and later reinstated, literally covers a case such as this where

the plant is closed and the workers discharged. For if the plant ever reopened, the workers would indeed be re-employed, and not merely reinstated; the employment relationship would have been severed, not, as in a layoff, merely suspended.

Furthermore, while the arbitrator cannot be criticized for having failed to foresee the reopening of the plant 18 months after it was closed, that event provides a basis for the company's argument that all it did when it closed the plant was to lay off these workers temporarily, a contingency for which (the company argues) the contract provides. Thus, on the company's view, the workers had to wait until they had worked 200 hours in 1983 and then they would be entitled to a paid vacation — but in that year, not in 1982, when, being laid off the whole year, they could not earn vacation pay by working 200 hours.

But all this just amounts to saying that the arbitrator may have been wrong, maybe even clearly wrong; it does not show that he was doing something other than interpreting the contract. See *Meyers v. Parex, Inc.*, 689 F.2d 17, 18 (2d Cir. 1982). The company, however, challenges the union to point to a provision that grants vacation pay to workers who neither were on the payroll on December 31 nor worked a single hour the following year; and of course there is none. But contracts have implied as well as express terms, and the authority of an arbitrator to interpret a collective bargaining contract includes the power to discover such terms. *Miller Brewing Co. v. Brewery Workers Local Union No. 9, supra*, 739 F.2d at 1163-64. Indeed, "as long as a plausible solution is available within the general framework of the agreement, the arbitrator has the authority to decide what the parties would have agreed on had they foreseen the particular item in dispute. . . . In such cases, judicial review is limited to whether the arbitrator's solution can be rationally derived from sone plausible theory of the general framework or intent of the agreement." *Desert Palace, Inc. v. Local Joint Executive Bd.*, 679 F.2d 789, 793 (9th Cir. 1982) (citations omitted).

Inferring an implied condition must be distinguished from creating one, tenuous as the distinction may be as a practical matter. The arbitrator may not modify the contract unless authorized to do so. *Morgan Services, Inc. v. Local 323, Chicago & Central States Joint Bd.*, 724 F.2d 1217, 1222-24 (6th Cir. 1984). He was not authorized to do so here; there was an emphatic "no modification" provision in the arbitration clause. But despite contrary intimitations in *Sears, Roebuck & Co. v. Teamsters Local Union No. 243*, 683 F.2d 154, 156 (6th Cir. 1982) (per curiam), there is no rule that an arbitrator, in order to find an implied condition, must first find the language of the contract to be ambiguous. Although a literal reading of the contract in this case would preclude the implied condition that the arbitrator found, he was not obliged to read the contract literally. See, e.g., *International Brotherhood of Electrical Workers, Local Union No. 199 v. United Telephone Co.*, 738 F.2d 1564, 1568 (11th Cir. 1984). This is true even though the "no modification" provision expressly confines the arbitrator to the "written provisions" of the collective bargaining agreement. We do not understand this to mean that he could not infer conditions, provided he did so from the written provisions; or that he had to read those provisions literally.

At argument we tested the company's commitment to literal interpretation by asking its counsel whether the arbitrator's award would be defensible if what the company had done was fire these workers on trumped-up charges on December 30 (the plant having remained open), to prevent them from qualifying for a paid vacation in 1982; and he said it would be. When we pointed out that no contract provision says this, he replied that good faith is an implicit provision of every collective bargaining contract, just as it is in contracts governed by the Uniform Commercial Code. See UCC §1-203. (He might have added that such discharges would violate other provisions of the contract.) Now there is no suggestion that the company acted in bad

faith — that it shut down the plant for any reason other than that the plant was unprofitable. But by doing so it prevented the workers from qualifying for a paid vacation by working 200 hours the next year unless it reopened the plant long enough before the end of that year (1982) to allow them to work that length of time — but the plant was not reopened till 1983. The arbitrator thought it contrary to the intent of the parties in adopting the vacation provisions of the contract that the company should be allowed to eliminate otherwise vested vacation rights by closing the plant. He thus found in the contract another implicit commitment by the company, besides a commitment to act in good faith: a commitment to pay for vacations that the workers had earned by working the required number of hours the previous year, in the event the company prevented the workers from satisfying the other condition of their vacation rights (being on the payroll on December 31 of that year) by shutting down the plant. Although this reading of the contract goes beyond merely implying a condition necessary to prevent bad faith, it *is* a reading of the contract, and not an appeal to sources of duty outside the contract.

This is not to say that simply by making the right noises — noises of contract interpretation — an arbitrator can shield from judicial correction an outlandish disposition of a grievance. There are cases, such as our *Young Radiator* case cited earlier, where no hypothesis other than that the arbitrator was importing into the dispute his own ideas of industrial justice would be tenable, no matter what he said. But this is not such a case. The doctrine of conditions is sufficiently flexible to make the arbitrator's reading of the contract conventional, at least in method. It may be that in his heart of hearts the arbitrator was actually moved by a sense that the impact of this plant closing on these workers ought in fairness to be buffered by payment of vacation pay (they did, though, receive severance pay). But we cannot peer into his heart, let alone his heart of hearts; and viewed

as an interpretation of the contract, the award is not so *outré* that we can infer that it was driven by a desire to do justice beyond the limits of the contract. This is further shown by the fact that when courts have been asked to interpret similar contract provisions, in cases where the parties had not agreed to arbitrate their disputes, they have as often adopted the interpretation of the arbitrator here, see, e.g., *Local Union No. 186, United Packinghouse, Food & Allied Workers v. Armour & Co.*, 446 F.2d 610 (6th Cir. 1971), as the interpretation urged by Ethyl, see, e.g., *Local Lodge 2040, Int'l Ass'n of Machinists v. Servel, Inc.*, 268 F.2d 692, 699 (7th Cir. 1959). It is of no moment that one of the cases supporting Ethyl's interpretation is ours; the issue for us in this case is not whether the arbitrator's interpretation of the contract was correct but whether it was a bona fide interpretation of the contract.

We have gone on at such length because we want to make clear that we take seriously the twin propositions that (1) the reviewing court's function (whether the district court's, or this court's) is at an end when it concludes that what the arbitrator did was interpretation of the contract, and (2) when in doubt the court must find that it was interpretation. We do not want to be plagued by cases in which companies or unions refuse to comply with arbitration awards merely because they think the arbitrator clearly misinterpreted the collective bargaining agreement. If parties to collective bargaining contracts are unhappy with arbitration awards they can bargain for a different method of selecting arbitrators, or for panels of arbitrators, trial or appellate.

A question remains, however, whether the arbitrator in this case intended all 30 workers to get vacation pay or just the eight that were not terminated before the plant closed. If we thought the question hopelessly difficult we would remand to the arbitrator for clarification of his award. It is true that an arbitrator, unlike a trial court or an administrative agency, is not a tribunal of continuing jurisdiction.

When the arbitration is over, the arbitrator is discharged, even if the award has not yet been enforced. But if the award is too ambiguous to be enforced, the court has — it has to have — the power to remand the case to the arbitrator for clarification. It can do this by directing the parties to recall the arbitrator (or appoint a substitute, if the original arbitrator is for some reason unavailable); the parties indicated at argument their willingness to abide by such a procedure. In any event, whatever theoretical difficulties remanding a case to an arbitrator who has lost jurisdiction may cause the fastidious analyst, the number of cases in which such remands have been made, and the common-sense reasons for the procedure in appropriate cases, put the issue beyond debate. See, e.g., *Young Radiator Co. v. International Union, U.A.W., supra*, 734 F.2d at 326; *American Federation of State, County & Municipal Employees, Local Lodge No. 1803 v. Walker County Medical Center, Inc.*, 715 F.2d 1517, 1519 (11th Cir. 1983) (per curiam); *McClatchy Newspapers v. Central Valley Typographical Union No. 46, Int'l Typographical Union*, 686 F.2d 731, 734 n. 1 (9th Cir. 1982) (dictum).

But it is a procedure to avoid if possible, given the interest in prompt and final arbitration. Cf. 6 Kheel, Labor Law §24.05[4] (1984). Concern has been expressed that some companies nowadays are trying to reduce the credibility of unions by dragging out the grievance process through challenges in court to arbitration awards. See *Miller Brewing Co. v. Brewery Workers Local Union No. 9, supra*, 739 F.2d at 1168. Ethyl's success in the district court makes us unwilling to say that its refusal to comply with the arbitrator's award, thereby putting the union to the expense and delay of this suit, was frivolous and should be punished. But we do not want to delay compliance with the award further by remanding the matter to the arbitrator for a clarification likely to provoke a further challenge from the company. We ought if at all possible resolve the case once and for all now; and we think it is possible.

The award itself, as distinct from the arbitrator's opinion, a separate document, is unambiguous when tacked together with the grievance. The award says simply that the grievance is sustained, and the grievance was on behalf of all the workers terminated after the announcement of the plant closing — which is to say, all 30 workers, since the announcement was made on October 15, 1981, and the first terminations didn't come till October 18. The ambiguity comes from the statement in the arbitrator's opinion (quoted earlier) that it is the workers who were discharged when the plant closed on December 4 who are entitled to vacation pay; and those are the eight, not the 30. It seems apparent, though, that the arbitrator just made a mistake, and that if we remanded the case for clarification he would say that he meant what the order said.

It is true that labor arbitrators are prone to issue compromise awards not all of which fit a court's idea of what is rational or principled, but we can find nothing in the arbitrator's opinion to suggest that he might have designed a compromise along these lines, especially when Ethyl did not argue for separate treatment of the eight. To confine relief to the employees who happened still to be on the payroll the day the plant closed — to deny relief to the other 22 on the theory that they were laid-off, rather than terminated as a result of a plant closing — would be an inexplicable caprice, as well as being outside the issues defined by the parties. There is no dispute that all the terminations after October 15 were part of the winding down of the plant's operations to zero, a process completed on December 4; they were not layoffs from an ongoing establishment. To distinguish between the workers terminated before the plant closed (but after the announcement) from those terminated when or after it closed would be to invite an employer in Ethyl's position to terminate everyone the day before the plant closed; or if a plant empty of workers must be deemed closed, to terminate all but one the day before the plant closed — and only that one would be

entitled to vacation pay. This would be such a weird result that we require something more than an offhand comment in the arbitrator's opinion to make us think he might have intended it — especially when the order itself is unambiguous.

The judgment is reversed with directions to enforce the arbitrator's award of $53,887.68.

REVERSED WITH DIRECTIONS.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

Judgment, Order, and Opinion of the District Court
(Entered October 23, 1984)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ETHYL CORPORATION,	)	
	)	
Plaintiff,	)	
	)	Civil Action No.
v.	)	
	)	IP 83-471-C
	)	
UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC AND LOCAL NO. 7441, UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,	)	
	)	
Defendants.	)	

JUDGMENT

This cause is now before the Court upon the plaintiff's, Ethyl Corporation, and defendants', United Steelworkers of America, AFL-CIO-CLC and Local No. 7441, United Steelworkers of America, AFL-CIO-CLC, cross motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

Whereupon, the Court, having heard oral argument on the motions, having considered the memoranda filed in support thereof and in opposition thereto, and having GRANTED the plaintiff's motion and DENIED the defendants' motions, hereby ENTERS JUDGMENT for the plaintiff Ethyl Corporation and against the defendants, United Steelworkers of America, AFL-CIO-CLC and Local

No. 7441, United Steelworkers of America, AFL-CIO-CLC.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the arbitrator's award is vacated in favor of the plaintiff and that the defendants take nothing by way of their counterclaim.

DATED this 23rd day of Oct., 1984.

James E. Noland

JAMES E. NOLAND, *U.S. District Judge*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ETHYL CORPORATION,	)	
	)	
Plaintiff,	)	
	)	Civil Action No.
v.	)	
	)	IP 83-471-C
	)	
UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC AND LOCAL NO. 7441, UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,	)	
	)	
Defendants.	)	

ORDER

This cause is now before the Court upon the plaintiff's, Ethyl Corporation, and defendants', United Steelworkers of America, AFL-CIO-CLC and Local No. 7441, United Steelworkers of America, AFL-CIO-CLC, cross motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

Whereupon the Court, having heard oral argument on said motions, having considered memoranda filed in support thereof and in opposition thereto, and being duly advised in the premises, hereby GRANTS the plaintiff Ethyl Corporation's motion for summary judgment and DENIES the defendants' cross motions for summary judgment.

IT IS SO ORDERED.

DATED this 23rd day of Oct., 1984.

James E. Noland

JAMES E. NOLAND, *U.S. District Judge*

MEMORANDUM ENTRY

The plaintiff Ethyl Corporation had a plastic manufacturing plant in Terre Haute. The defendants Union and Local No. 7441 had represented a unit of production and maintenance employees at the plant. In July of 1980 the parties had executed a collective bargaining agreement which was in effect when the present controversy arose.

On October 15, 1981 Ethyl announced that the plant would be closed in mid-November of 1981. On the date of the announcement thirty-three bargaining unit employees were on the active payroll. Four of these employees were on disability. On October 18, 1981 Ethyl released eleven of these employees. Ten more were released on November 22, 1981. On December 4, 1981 the remaining eight active employees were released by Ethyl. All the employees released retained their recall rights which existed under the 1980 contract.

On November 4, 1981 the Union filed a grievance because Ethyl had refused its request for Ethyl to pay 1982 vacation pay to all those employees who were on the active payroll on October 15, 1981, the date of the announcement of the plant closing.

The collective bargaining agreement in Article XVI, Section 2D provides in pertinent part:

> An employee with one (1) or more years of Company service credit who has worked 1,040 straight-time hours during the year prior and who is one the payroll of the Company on December 31 of the year prior to the calendar year in which he is eligible for a vacation plan, shall have a vested right upon completion of work on that December 31st to such vacation for the following year.

Obviously, the laid-off employees were not on the payroll on December 31. The Union in its grievance contended that this requirement was not applicable because the plant had closed prior to December 31.

Ethyl denied the grievance on December 22, 1981, stating that under the 1980 contract, an employee had to be on the payroll on December 31 of one year to be entitled to receive a vacation the next year. The dispute over the vacation pay was submitted to arbitration under the terms of the collective bargaining agreement. A hearing was held before the arbitrator on August 26, 1982. The Union argued that the vacation pay was an accrued benefit and Ethyl could not avoid paying the vacation benefits in 1982 because the plant closing had made it impossible for the employees to comply with one of the eligibility requirements.

On the other hand, Ethyl argued that the plant shutdown was no different than a lay-off and in the past, employees laid off and not on the payroll on December 31 in one year were denied vacation pay for the next year.

On December 22, 1982 the arbitrator issued his award. The arbitrator ordered that:

> Employees who were actively working at the time of the plant closing on December 4, 1981 are entitled to vacation pay for 1982 as the Company made it impossible for such employees to fall into the exceptions negotiated in Section E of Article XVI.

The parties have stipulated that eight employees were actively working on December 4, 1981. On April 1, 1983, within ninety days of the mailing of the award, Ethyl filed its complaint, seeking to have the arbitrator's award vacated. The Union filed an answer and counterclaim on April 14, 1983. The counterclaim seeks to have the arbitrator's award enforced.

Ethyl asserts that the arbitrator exceeded his contractual grant of authority by not applying the December 31 payroll eligibility requirement for 1982 vacation pay to the employees who were released by Ethyl when the plant was shut down on December 4, 1981.

In reviewing an arbitrator's award, this Court is to determine whether the award "draws its essence from the collec-

tive bargaining agreement" and whether "the arbitrator's words manifest an infidelity to this obligation". *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 80 S.Ct. 1358, 1361, 4 L. Ed.2d 1424 (1960). "'[O]nly where there is a manifest disregard of the agreement, totally unsupported by principles of contract construction and and law of the shop, may a reviewing court disturb the award'." *Smith Steel Workers, Etc. v. A.O. Smith Corp.*, 626 F.2d 596 (7th Cir. 1980) (quoting *Amoco Oil Co. v. Oil, Chemical and Atomic Workers*, 548 F.2d 1288, 1294 (7th Cir. 1977).

Therefore, the issue before the Court is whether the arbitrator's decision failed to draw its essence from the collective bargaining agreement or otherwise evinces a manifest disregard of the agreement.

Section E of Article XVI provided that employees who were on lay-off on December 31 were entitled to vacation pay in the next year if they were recalled and worked 200 straight time hours in accordance with Section E.

The arbitrator found:

> The present situation is not the equivalent of a layoff in terms of contract interpretation. The parties have negotiated regarding the consequences of a layoff and the effect of such an occurrence on the entitlement of the employees to vacation pay. They have not done the same for a plant closing, as in the present situation.
>
> The question to be answered is whether the December 31st date was intended to be applicable in the case of a totally involuntary termination where there is no possibility of recall or recourse under Section E of Article XVI of the Agreement between the parties. In the opinion of the arbitrator, the parties did not intend the December 31 requirement to be applicable in a situation where an employee was unable to have recourse under Section E. The intention of the parties was that where there is a likelihood of recall so as to work the requisite 200 hours in

> the current year as set forth in Section E of the Agreement, then, and only then, is employment on December 31st a prerequisite to vacation entitlement.

In effect, the arbitrator held that Ethyl, by closing the plant, had made compliance with the eligibility requirements impossible, thereby "rendering a right which is otherwise contractually guaranteed void..." The right referred to is the possibility of being recalled in the year subsequent to lay off, working 200 straight hours, and therefore being eligible for vacation pay.

The Court finds that the arbitrator's award did not draw its essence from the agreement. The award is outside the powers conferred on the arbitrator by the terms of the collective bargaining agreement. It imposes upon Ethyl obligations not contained in the agreement and therefore not bargained for by Ethyl.

The Court has reviewed the case law cited by the parties and is persuaded by the analysis set forth in *Buchholtz v. Swift & Company*, 609 F.2d 317 (8th Cir. 1979), *cert. denied*, 444 U.S. 1018, 100 S.Ct. 672 (1980). In that case the agreement contained a requirement that the employees were eligible for subsequent annual vacations if they were "being carried on the active payroll..." on December 28. The Court found that "employment on the 28th represents not merely an administrative device, but a requirement for vacation eligibility." *Id.* at 323.

The Court in *Buchholtz* considered the language of the contract, the collective bargaining history, and the past practice under the agreement between the parties. The Court explicitly declined to follow decisions which have prorated vacation benefits because the unilateral action of the employer made employment of the eligibility date impossible. *Id.* at 326, 327.

As in the present case, the past practice of the company was to deny vacation to those employees who were not on the payroll on December 31 and who were not recalled the subsequent year.

The present agreement does not provide for pro rata vacation payments. This Court concludes that the terms of the agreement and practices of the parties thereunder requires [sic] a finding that being on the payroll on December 31st was a contractual precondition to vacation eligibility. The parties contracted for a collective bargaining agreement with two eligibility requirements and the union is therefore bound thereby. *See Local P-171, Etc. v. Thompson Forms Co.*, 642 F.2d 1065, 1075, 76 (7th Cir. 1981).

APPENDIX C

Judgment of the Seventh Circuit
(Entered July 22, 1985)

JUDGMENT — ORAL ARGUMENT

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

July 22, 1985.

Before

Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. RICHARD A. POSNER, *Circuit Judge*
Hon. THOMAS E. FAIRCHILD, *Senior Circuit Judge*

ETHYL CORPORATION, *Plaintiff-Appellee,*	) Appeal from the) United States) District Court for
No. 84-3013 vs.	) the Southern) District of Indiana,
UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC and LOCAL NO. 7441, UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, *Defendants-Appellants.*	) Indianapolis) Division.) No. 83 C 471)) Judge James E.) Noland

This cause was heard on the record from the United States District Court for the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby REVERSED WITH DIRECTIONS, in accordance with the opinion of this court filed this date.

APPENDIX D

Arbitration Opinion and Award
(Rendered December 22, 1982)

AMERICAN ARBITRATION ASSOCIATION
VOLUNTARY LABOR ARBITRATION TRIBUNAL

CASE NO. 52 30 0009 82

CHARLES F. IPAVEC
Arbitrator

In the Matter of the Arbitration Between:

VISQUEEN, FILM PRODUCTS DIVISION, ETHYL CORPORATION TERRE HAUTE, INDIANA	)	
and	)	OPINION AND AWARD Grievance Concerning Vacation Benefits
UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, LOCAL 7441	)	

The hearing in this matter was conducted on August 26, 1982, in a conference room of the Best Western Hotel, in Terre Haute, Indiana, before Charles F. Ipavec, the arbitrator who was mutually selected by the parties pursuant to Article VII of the Collective Bargaining Agreement between the parties, and through the administrative services of the American Arbitration Association.

The case for the Union was presented by S. Howard Kline, Attorney at Law. Also in attendance for the Union were Charles Carl, Staff Representative; Donald E. Kirby, Local President; and William J. Woodcock, Staff Representative.

The case for the Company was presented by Lyle J. Guilbeau, Assistant Counsel, Labor Relations. Also in attendance for the Company were Robert G. Copes,

Manager, Employee Relations, and Larry A. Wheelock, Plant Manager.

There were no objections made to the jurisdiction of the arbitrator either upon procedural grounds or upon substantative grounds. Therefore, this matter is properly before the arbitrator for a final and binding decision. An official record of the proceedings at the hearing was made by Janalyn Gross, Stenographic Reporter with John E. Connor & Associates.

Both parties filed timely post hearing briefs.

GRIEVANCE

On November 4, 1981, a grievance was filed on behalf of all employees, requesting the following:

> Employees on Roll at announced shutdown date be granted all vac. due them as if on pay roll Dec. 31.

The Union identified the contractual violation in the following manner:

> Due to the action of the Company in closing the plant so close to the Dec. 31 deadline as spelled out in the contract, the second requirement for vacation eligibility is not applicable (sic.).

ISSUE

The issue in this proceeding may be stated thusly: Did the Company violate the Agreement between the parties when it refused vacation pay for 1982 to employees of a plant shut down on December 4, 1981, on the basis that such employees were not on the payroll on December 31, 1981, and, if so, to what remedy, if any, are the grievants entitled?

CONTRACT PROVISIONS

The following provisions from the Agreement between the parties are deemed to be pertinent to the within dispute:

ARTICLE IV

MANAGEMENT RIGHTS

The management of the works and the direction of the working forces, including the right to hire, suspend or discharge for proper cause, or to transfer and to relieve employees from duty because of lack of work is vested exclusively in the Company, provided that this will not be used for purposes of discrimination against any member of the Union, nor will it be used contrary to any other provisions of this agreement. It is understood and agreed that the foregoing statement of management functions shall not be deemed in any way to exclude other management functions, not specifically enumerated or not given up in this agreement.

ARTICLE XVI

VACATION PLAN

Section 2 — Vacation Plant [sic]

A. Vacation Schedule

1. An employee must complete one (1) year of Company service to attain initial vacation eligibility. After attainment of such eligibility he shall receive two (2) weeks of vacation.

D. Vested Rights

An employee with one (1) or more years of Company service credit who has worked 1,040 straight time hours during the year prior and who is on the payroll of the Company on December 31 of the year prior to the calendar year in which he is eligible for a vacation with pay, as set forth in this vacation plan, shall have a vested right upon completion of work on that December 31st to such vacation for the following year.

If the employee has not worked 1,040 straight-time hours during the prior year, or if the employee is not on the payroll on December 31, of the year prior, he must work 1,040 straight-time hours in the current year to

become entitled to receive a vacation in the current year, except as noted in Paragraph E. 1(b) below.

E. Interruption in Service
1. Termination and Re-Employment

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(b) When an employee who has attained initial vacation eligibility is terminated for any reason, he is entitled to receive any vested vacation that has not been taken. If he is later re-employed with the company service credit for prior service he will, after working 200 straight time hours, become entitled to a full current year's vacation. Such entitlement will not become effective until the following calendar year if it would otherwise result in a duplication of current year vacation. If an employee is recalled too late in the year to work 200 hours or if he is laid off prior to working 200 hours, he will be paid for any vacation vested in him under this Paragraph (b).

POSITION OF THE UNION

On December 4, 1981, the Company effected its unilateral decision to permanently close its Terre Haute plant, resulting in the termination of approximately 50 bargaining unit members with at least 1,040 hours of work in 1981, who remain available for recall to work. The Union contends that the decision by the Company to deny such employees their 1982 vacation eligibility is improper.

The shutdown of the plant on December 4, 1981 was fundamentally different from a layoff of employees. The intent is that such closing shall be permanent. Indeed, the communications of the Company with both the media and with the area plant managers refers to the closing of the plant. Thus, the situation in December, 1981 is substantially different from circumstances surrounding a lay-off of employees with vacation eligibility.

It is essential that the Agreement between the parties be interpreted within the context of the permanent closing of

the plant rather than in terms of a layoff. The provisions of the Agreement between the parties were negotiated with the expectation that the plant would continue operating. Thus, the terms of the Agreement including the provisions on Vacation eligibility should be interpreted in a manner consistent with the intentions and expectations of the parties.

As the unilateral decision by the Company to shutdown the plant made it impossible for any employee to comply with the requirement that employees be on the payroll on December 31, 1981, to be eligible for 1982 vacation pay, such provision must be made inapplicable in the present situation. When the Company has decided to close down the plant prior to December 31, 1981, employees otherwise eligible for vacation pay for 1982 should not thereby be deprived of a contractual right.

The intent of the parties in negotiating such contract language was to preclude vacation payment to employees who were discharged, quit or severed employment status prior to December 31, 1981. The parties did not contemplate such language to be applicable in the case of a permanent shut-down of the plant.

The interpretation of the Agreement by the Company is contrary to case law, arbitral authority, and contract interpretation. On the basis that vacation pay is a form of a deferred wage, Courts have found that in situations similar to the present case, employees are entitled to vacation pay for which they are otherwise eligible. Through the action of the Company it became impossible for the employees to comply with the requirement that they be on the payroll on December 31, 1981. Since the Company made it impossible to satisfy this condition, the same is inapplicable in the present case.

In arbitration cases handling comparable issues, the Company has been ordered to pay vacation benefits on the basis that as a plant closing had not been contemplated by

the parties, a requirement that employees be on the payroll on a certain date may not be used in a context in which it was not intended. Furthermore, arbitrators have held that vacation benefits are earned over a period of time and that such benefits may not be voided by a unilateral decision to shutdown the plant.

A Court case upholding denial of vacation pay to employees of a shut-down plant may be distinguished from the present case. Unlike the situation in *Buchholtz v. Swift & Co.*, the parties herein have not entered into any Settlement Agreement relative to the plant closing. Secondly, the parties did not negotiate the December 31st requirement during the most recent contract negotiations and thus, did not contemplate such being applicable in the event of a plant closing. Thirdly, the parties have established a practice whereby employees absent on December 31st are otherwise eligible for vacation benefits.

The Agreement between the parties requires the Company to pay vacation benefits for 1982 to those employees who have worked 1,040 hours in 1981 but are precluded from being on the payroll on December 31, 1981, by reason of the unilateral decision of the Company to permanently close down operations at the plant.

The grievance should be sustained.

POSITION OF THE COMPANY

The Company contends that entitlement to vacation pay does not occur until all of the conditions precedent to vesting have been completed. Vesting of the right to vacation pay is contingent upon an employee having one or more years of Company service, working 1,040 straight time hours during the year prior, being on the payroll of the Company on December 31 of the year prior.

On December 4, 1981, the Company shut down operations at the plant herein. Accordingly, there were no employees on the payroll on December 31, 1981, a condition

precedent to the vesting of vacation pay. Thus, the employees grieving for vacation pay in the instant proceeding had not complied with the express language of the contract and were not entitled to vacation benefits.

The vesting of vacation pay has always been determined in accordance with the express terms of Article XVI of the Agreement between the parties. In the past the Union has unsuccessfully attempted to eliminate the requirement that employees be on the payroll on December 31 to be eligible for vacation pay. The Union ought not herein accomplish that which it could not achieve at the bargaining table.

The present situation is no different from other cases in which vacation pay eligibility was denied on the basis that an employee was not on the payroll on December 31, of the preceding year. The Company has a contractual right to close its plant and terminate its employees for economic reasons. It is not required to maintain operations at a loss.

The arbitrator is without authority to create an exception to the vacation eligibility which the parties have not themselves negotiated. Nor ought the arbitrator use the involuntary plant closing to excuse the contract condition where the Company had no collateral duty to bring about the condition. The Company had no duty to maintain operations so as to enable employees to be eligible for vacation benefits.

A proper analysis of contract law sustains the position of the Company in this regard. The Company had not agreed to bring about the December 31st payroll requirement. In the absence of a collateral duty to bring about the happening of a condition precedent, the promisor need not perform if the event fails to occur. The Company had made no promises to have employees on the payroll on December 31, 1981.

The Collective Bargaining Agreement does not create or guarantee the continuation of the employment relationship. Rather, it governs the terms of the relationship.

The vacation plan negotiated by the parties herein is not a deferred wage plan. It is a creature of the contract and is accordingly controlled by the contractual language. When the contract requires employment on a fixed date for vacation entitlement, arbitrators have so enforced the terms of the contract and have held that an employee not in the employ of the Company on the given date is not entitled to the vacation benefits. The clear and unambiguous language of the Agreement between the parties sets forth December 31st as a required eligibility date and a condition precedent to the vesting of vacation pay. There is no collateral duty upon the Company to maintain operations at a loss so as to ensure vacation eligibility for employees.

The grievance should be denied.

DECISION

The facts giving rise to the present arbitration proceeding are not in dispute. The matter grieved by the Union herein requires contract interpretation and application rather than a determination as to occurrences and events. The factual data may be readily set forth.

On October 15, 1981, the Company announced by means of a news media release its intent to close down operations at the plant herein. Operations at the facility were, indeed, shut-down on December 4, 1981. Such shutting down was contemplated by the parties to be a permanent closure. The decision to close was based upon business conditions in the plastic film market and the propriety of the closing is not in controversy.

Accordingly, the Company issued severence pay to its employees. Thereafter, the Union filed a grievance on behalf of approximately fifty employees eligible for vacation pay asserting that the plant closing ought not to deprive the employees of the contractual vacation pay for 1982. In response to the grievance the Plant Manager replied that employees terminated prior to December 31,

1981, do not qualify for the 1982 vacation pay in accordance with Article XVI, Section D of the collective bargaining Agreement. The pertinent provisions on vacation pay set forth that an employee with one or more years of service to the Company shall have a right to vacation pay if he has worked 1,040 straight time hours during the year prior and if he is on the payroll of the Company on December 31, of the year prior to the calendar year in which he is eligible for a vacation with pay.

The Company contends that as the contract requires emloyees [sic] to be on the payroll of the Company on December 31, 1981, to have a vested right to vacation pay, the employees terminated by the plant closing on December 4, 1981, cannot comply with the conditions precedent to vacation pay and they cannot secure a vested right to vacation pay for the 1982 year.

The Union on the other hand asserts that the provision requiring employees to be on the payroll in [sic] December 31, 1981 is inapplicable to the present situation as the Company unilaterally made it impossible for the otherwise eligible employees to be on the payroll on December 31, 1981, and thus, such employees ought to have a vested right to vacation benefits. It was the action of the Company which made it impossible for the employees to comply with the requirement that such employees be on the payroll on December 31st.

Both the Union and the Company have introduced arbitral and judicial authority to support their respective positions. However, each case must turn upon the unique set of facts and circumstances under which it arose and on the proper interpretation to be rendered to the language used by the parties to express their intentions. For example, an 8th Circuit Court of Appeals case cited by the Company may be distinguished from the present case in that in the Court of Appeals case the Union had been put on notice as to the plant closing and had negotiated with the Company in regard to the same.

The determinative consideration in each case is the contractual language used by the parties, the intention of the parties in negotiating such language, and the facts giving rise to the controversy. The arbitrator finds that at the time of the contract negotiation for the instant agreement, the parties could not have anticipated the plant closing. The provisions on vacation pay were negotiated by the Union and management and included within the Collective Bargaining Agreement with the full intent that operations would continue at the plant. There is nothing within the Agreement which specifically covers the event of a plant closing. Although the Union does not contest the management's right to close down the plant, the Union does maintain that such closure cannot deprive the bargaining unit of rights for which it negotiated in good faith. All the terms of the Agreement between the parties were collectively bargained for under a presumption that the plant would remain operative and functioning throughout the duration of the contract.

The terms of the contract pertinent to vacation pay set forth two concepts: eligibility and vesting. An employee becomes eligible for vacation pay after completing one year of service to the company in accordance with Article XVI of the Agreement. Entitlement to vacation pay is set forth in Section 1 of Article XVI which provides that employees must work 1,040 straight time hours during the preceding year and be on the payroll on December 31 of the prior calendar year to be entitled to vacation pay. Thus, employees who are on layoff on December 31 of the preceding year are not entitled to vacation pay unless they are recalled and work 200 straight time hours in the current year in accordance with Section E of Article XVI.

The present situation is not the equivalent of a layoff in terms of contract interpretation. The parties have negotiated regarding the consequences of a layoff and the effect of such an occurrence on the entitlement of the

employees to vacation pay. They have not done the same for a plant closing, as in the present situation.

At the time of the negotiation for vacation pay the parties considered the possibility of laid-off employees and the vacation pay section on Vested rights is designed to cover such situations as well as forms of voluntary termination. The parties did not, however, consider or negotiate the effects of a plant closing.

The question to be answered is whether the December 31st date was intended to be applicable in the case of a totally involuntary termination where there is no possibility of recall or recourse under Section E of Article XVI of the Agreement between the parties. In the opinion of the arbitrator, the parties did not intend the December 31 requirement to be applicable in a situation where an employee was unable to have recourse under Section E. The intention of the parties was that where there is a likelihood of recall so as to work the requisite 200 hours in the current year as set forth in Section E of the Agreement, then, and only then, is employment on December 31st a prerequisite to vacation entitlement.

The difference between a layoff and a plant closing is significant in this regard. In the case of a layoff there is a possibility that the employee may be recalled so as to work 200 hours in the current year, thereby coming under the terms of the final paragraph of Section D and Section E of Article XVI. It is clear in reading the terms of the entire Article that the parties intended to provide a protection for those employees who were not on the payroll on December 31 through no fault of their own.

In the case of a plant closing, however, it is impossible for the employees who have been terminated to return to the plant in the current year to work the 200 hours set forth in the Agreement. Whereas a layoff always presents the possibility of returning to work to secure vacation entitlement, a plant closing eliminates such a possibility and opportunity to fall under the terms of Article XVI.

By making it impossible for the employees to return to work in the current year through the action of closing the plant, the Company has effectively nullified or eliminated any opportunity for the employees to comply with either the December 31 requirement or the return to work provisions of Section E. As there is no opportunity or possibility of opportunity for the employees to fall within the negotiated exceptions for employees not on the payroll on December 31, 1981, such an entitlement provision cannot, in the opinion of the arbitrator, be made applicable in this case.

The vesting requirement that an employee be on the payroll on December 31, 1981, is meaningless where there is no possibility of returning to work for 200 hours in the current year. By its unilateral action the Company has essentially nullified provisions which have been negotiated and incorporated into the Collective Bargaining Agreement. Such action is, in effect, a subtracting from the agreed upon terms. In the present case by rendering it impossible for the employees to comply with the December 31st requirement and by eliminating the possibility of recall within the current year so as to work the 200 hours, the Company made it impossible for the employees to claim entitlement to vacation pay even though such employees have worked the requisite 1,040 hours. A party cannot make compliance with a contract provision an impossibility, thereby rendering a right which is otherwise contractually guaranteed void, without being in violation of the terms of the Agreement. The employee must have the opportunity to comply with the provisions. In the case of a layoff the employee may have the right to comply with the provisions of the Agreement. In the case of a plant closing, however, such opportunity is completely eliminated. To take a unilateral action that nullifies provisions of the contract can be construed to be a contract violation.

Had the parties agreed to the action by the Company, the outcome of the present proceeding may have been different. However, there is no evidence which would indi-

cate that the employees had released the Company from vacation pay or other provisions of the Agreement by virtue of severance pay. Employees, therefore, still have contractual rights and eligibilities. In the opinion of the arbitrator, these rights and eligibilities include the right to vacation pay after working 1,040 straight time hours. Employees who were actively working at the time of the plant closing on December 4, 1981, are entitled to vacation pay for 1982 as the Company made it impossible for such employees to fall into the exceptions negotiated in Section E of Article XVI.

There is much arbitral and judicial authority for the position of both parties in this matter. In the opinion of the arbitrator, those cases which support the proposition that the parties must keep open the possibility of compliance with the terms of the agreement in order for the terms to be applicable are the more persuasive authorities.

AWARD

The grievance is hereby sustained.

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Charles F. Ipavec

Dated and made effective at the facility of the Company in Terre Haute, Vigo County, Indiana, this 22nd day of December, 1982.